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Supreme Court of the United States

OCTOBER TERM 1938.

No. 195

SOCONY-VACUUM OIL COMPANY, INC.,
(Defendant-Appellant below),
Petitioner,

—against—

HERBERT A. SMITH, JR.,
(Plaintiff-Appellee below),
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE COURT PRESS, N. Y. C.

INDEX.

	PAGE
The Facts	1
FIRST POINT—There is no opinion, authority or reason to support the petition for the wr	2
Argument	4
SECOND POINT—The decision below creates no conflict of opinion or authority between the second and other circuits	6
CONCLUSION	7

TABLE OF CASES CITED:

American Pacific Whaling Co. v. *Kristensen*, 93 Fed. (2d) 17 (C. C. A. 9th, 1937) 6

Arizona, The v. *Anelich*, 298 U. S. 110, 80 L. Ed. 1075 2

Beadle v. *Spencer*, 298 U. S. 124, 80 L. Ed. 1082 ....2, 4, 5

Hardie v. *New York Harbor Dry Dock Corporation*, 9 Fed. (2d) 545 (C. C. A. 2nd, 1925) 3

Holm v. *Cities Service Transp. Co.*, 60 Fed. (2d) 721 (C. C. A. 2nd, 1932) 3

Hunt et al. v. *Hobbs, Wall & Co.*, 42 Fed. (2d) 437 (C. C. A. 9th, 1930) 5

Johnson v. *United States*, 74 Fed. (2d) 703 (C. C. A. 2nd, 1935) 3

Scheffler v. *Moran Towing & Transportation Co., Inc., et al.*, 68 Fed. (2d) 11 (C. C. A. 2nd, 1933) 5

Tampa Interocean S. S. Co. v. *Jorgensen*, 93 Fed. (2d) 927 (C. C. A. 5th, 1938) 3, 6

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(Plaintiff-Appellee below),
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Facts.

The opinion of the United States Circuit Court of Appeals Second Circuit, 96 Fed. (2d) 98, sets forth respondent's task at the time of the accident, the way he did the task and the manner in which the accident occurred.

The place of work was confined and restricted, being limited to fifty-one inches in length (R. 355, 356) and in the absence of orders and instructions, the presence of the stepplate (the cause of the accident) invited its use, see photographic exhibits (R. 434, 436, 476). Petitioner gave respondent no orders or instructions how to do the task (R. 135). There is not a scintilla of evidence that respondent was forbidden to use the stepplate or that he was ordered

or instructed to do the task the way petitioner contends it should have been done. Respondent's superior, the first assistant engineer, testified that he and the ship's other engineers did not order or instruct respondent how to do the task, that there was no set or uniform way of doing the task and that he had seen the ship's oilers do the task in different ways (R. 341, 343, 350, 351). From the time respondent joined the ship, every twenty minutes he was on watch, he did the task the same way (R. 93, 136). Respondent did the task that way because it was the best and most thorough way (R. 394, 395). and it was the only safe way he could do it (R. 88, 89, 90). Prior to the accident he had done the task that way in the presence of his superior, without reprimand (R. 134, 135, 136).

FIRST POINT.

There is no opinion, authority or reason to support the petition for the writ.

In *Arizona* v. *Anelich,* 298 U. S. 110 and *Beadle* v. *Spencer,* 298 U. S. 124, this Court squarely held that a seaman does not assume the risk of a defective appliance or an unsafe place to work. Petitioner seeks to bring this case outside that rule on the ground that within the restricted limits of respondent's place of work he could have done the task without using the defective stepplate, or stated another way, that respondent had a choice between a safe and an unsafe way of doing his task.

There are cases holding that a seaman assumes the risk if he selects an unsafe way when a safe way is available; an analysis of the cases cited by peti-

tioner discloses that the rule has been restricted to cases where the seaman was not engaged in a task and subject to the compulsion and restraint of duty.

In *Holm* v. *Cities Service Transportation Co.*, 60 Fed. (2d) 721 (C. C. A. 2, 1932) the seaman went aft for a drink of water by means of the safe flying bridge and he then elected to return to his quarters by means of the dangerous well deck.

In *Johnson* v. *U. S.*, 74 Fed. (2d) 703 (C. C. A. 2, 1935), the seaman took the dangerous open well deck on his way to supper despite orders to use the safe shaft tunnel.

In *Hardie* v. *N. Y. Harbor Dry Dock Corporation*, 9 Fed. (2d) 545 (C. C. A. 2, 1925), the seaman in going to his place of work elected to proceed by means of a dark passageway when a lighted and safe route was available for his use.

In *Tampa Interocean S. S. Co.* v. *Jorgensen*, 93 Fed. (2d) 927 (C. C. A. 5, 1938), the plaintiff was proceeding below to cover a 'tween deck hatch; there were two ladders leading to the 'tween deck, but only one provided a safe means of access and in proceeding to his place of work he took the ladder providing the unsafe way. The trial judge modified defendant's request to charge as to assumption of risk and charged in part:

> "* * * *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable."

Plaintiff had judgment, on appeal it was affirmed and held that the trial judge properly modified the

request. As plaintiff had judgment, the Appellate Court was not called upon to decide whether the charge as given was too broad; consequently the charge as given cannot be regarded as a rule of law promulgated by the Appellate Court.

Argument.

In each of the foregoing cases the seaman was not engaged in a task, he was proceeding to a destination and he merely had to choose between two clearly marked and defined routes, one being obviously safe and the other just as obviously unsafe; *in effect no choice was required since the safe route was the natural way to proceed.*

The facts here are entirely different. Respondent was engaged in a task, it was not a simple one as it involved complicated machinery. Respondent was subject to the compulsion and restraint engendered by the performance of the task and since he was not ordered or instructed how to perform it, he was compelled to exercise judgment in choosing a method or technique of performance. The facts clearly indicate that he chose the most thorough method and the only safe and practical way. True, after adopting the method, an appliance he had to use became defective. Assuming, without conceding, that he could have done the task by abandoning the defective appliance (the stepplate) and standing some other place, it would seem that the particular point at which he stood within the narrow limits of his place of work, invokes the doctrine of contributory negligence and not the defense of assumption of risk. As this Court in *Beadle* v. *Spencer* (*supra*), said:

"It may be that he was negligent in standing at one point rather than at another upon the unsafe pile of lumber, see *Seaboard Air Line Ry. Co.* v. *Horton*, 233 U. S. 492; *cf. The Frank and Willie, supra*, and that an instruction as to the effect of his negligence would have been appropriate. But we think the charge in the form requested, so far as applicable to the evidence, and in view of that actually given, amounted to no more than a request to charge that his negligence was a defense."

It is certain that no American case has recognized the rule that petitioner seeks to establish.

Petitioner also relies on *Scheffler* v. *Moran Towing & Transportation Co., Inc., et al.*, 68 Fed. (2d) 11 (C. C. A. 2, 1933), and *Hunt, et al.* v. *Hobbs, Wall & Co.*, 42 Fed. (2d) 437 (C. C. A. 9, 1930). These cases are completely outside the issues under consideration here and do not give petitioner the slightest support.

In the *Scheffler* case plaintiff was employed on a harbor tug which he left every evening and he knew that she was shorthanded when he went aboard on the day of the accident; he was held to have assumed the risk of shorthandedness on the ground that he had the alternative of quitting. The case is overruled by *Beadle* v. *Spencer* (*supra*), in which it was held that a seaman does not assume the risk of an unsafe place to work when the ship is moored to a dock.

The *Hunt* case did not involve defective equipment or a place of work that had been made unsafe. There the decedent, in order to free a piece of timber, voluntarily went out on a narrow beam which ran across

an open hatch, the beam was part of the ship's framework and was not constructed or intended as a place of work at any time; it was not defective and decedent fell from it because of his position and carelessness on it. The Court said that the accident:

> "* * * was caused by the unusual position of the decedent and not by any structural defect of the beam."

SECOND POINT.

The decision below creates no conflict of opinion or authority between the second and other circuits.

Petitioner only cites *American Pacific Whaling Company* v. *Kristensen*, 93 Fed. (2d) 17 (C. C. A. 9th, 1937), and *Tampa Interocean S. S. Co.* v. *Jorgensen* (*supra*), in support of the contention that the decision below is in conflict with the decisions of the Circuit Courts of Appeals in other circuits.

In the *Kristensen* case, the whaling gun was defective and the question of choice of working place or equipment was not raised by the parties and not discussed in the opinion. The case cannot be a source of conflict here.

Tampa Interocean S. S. Co. v. *Jorgensen* (*supra*), has been analyzed (pp. 3, 4), it merely involved a choice of routes to a destination and further, as pointed out, the decision of the Circuit Court of Appeals, Fifth Circuit, did not make the modified charge of the trial judge a rule of law for that circuit.

It is apparent, that at this time, there is no conflict between the Circuit Courts of Appeals.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

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